FEDERAL COURT OF AUSTRALIA

Sun v Minister for Immigration and Border Protection [2016] FCAFC 52

Appeal from:	*Sun & Ors v Minister for Immigration & Anor* [2015] FCCA 2479
File number:	QUD 928 of 2015
Judges:	**LOGAN, FLICK AND RANGIAH JJ**
Date of judgment:	5 April 2016
Catchwords:	**MIGRATION** – Migration Review Tribunal – whether onus or burden of proof lies on Tribunal – absence of express statutory burden – whether peculiar features of its jurisdiction warrant implying such an onus **ADMINISTRATIVE LAW** – onus of proof – inapplicability of adversarial rules of evidence to administrative proceedings **PRACTICE AND PROCEDURE** – burden of proof – non-applicability to procedure of administrative Tribunal
Legislation:	*Administrative Appeals Tribunal Act 1975* (Cth) ss 2A, 33, 33(1) *Australian Soldiers' Repatriation Act 1920-1943* (Cth) ss 45, 47, 47(2) *Judiciary Act 1903* (Cth) ss 20, 20(15), 39B *Migration Act 1958* (Cth) ss 65, 65(1)(a)(ii), 97, 349, 353, 363(1)(d), 366D, 426 *Tribunals Amalgamation Act 2015* (Cth) *Migration Regulations 1994* (Cth), reg 1.03, Sch 2, cll 892.211, 892.223, Sch 4, item 4020
Cases cited:	*Appellant S395 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71, (2003) 216 CLR 473 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 *Avon Downs Pty Ltd v Commissioner of Taxation (Cth)* (1949) 78 CLR 353

Briginshaw v Briginshaw (1938) 60 CLR 336
Brown v Dunn (1893) 6 R 67

Buck v Bavone (1976) 135 CLR 110

Bushell v Repatriation Commission (1992) 175 CLR 408

Cameron v Holt (1980) 142 CLR 342
Clare v Australian Community Pharmacy Authority [2015] FCA 653

Dranichnikov v Minister for Immigration and Multicultural Affairs [2003] HCA 26, (2003) 77 ALJR 1088

Fraser v Health Care Complaints Commission [2015] NSWCA 421

George v Rockett (1990) 170 CLR 104
Iyer v Minister for Immigration and Multicultural Affairs [2001] FCA 929, (2001) 64 ALD 9

Jasbeer Singh v Minister for Immigration and Ethnic Affairs (unreported, Federal Court of Australia, Sackville J, 6 December 1994)

Kaur v Minister for Immigration and Border Protection [2014] FCA 1276

Linwood v Repatriation Commission [2016] FCA 90

McDonald v Director-General of Social Security (1984) 1 FCR 354

Metwally v University of Wollongong (1985) 59 ALJR 481

MH6 v Mental Health Review Board & Austin Health, Royal Talbot Hospital [2008] VSC 345

Millar v Commissioner of Taxation [2015] FCA 1104

Minister for Health v Thomson (1985) 8 FCR 213

Minister for Immigration and Border Protection v Stretton [2016] FCAFC 11

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18
Minister for Immigration and Citizenship v SZIAI (2009) 83 ALJR 1123; [2009] HCA 39

Minister for Immigration and Citizenship v SZIAI [2009] HCA 39, (2009) 83 ALJR 1123

Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611; [2010] HCA 16

Minister for Immigration and Citizenship v SZMDS [2010] HCA 16, (2010) 240 CLR 611

Minister for Immigration and Ethnic Affairs v Pochi (1980) 44 FLR 41

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

Minister for Immigration and Multicultural Affairs v Eshetu [1999] HCA 21, (1999) 197 CLR 611

Mladenov v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs [2014] FCA 12

NBDY v Minister for Immigration & Multicultural Affairs [2006] FCAFC 145

Park v Brothers [2005] HCA 73, (2005) 222 ALR 421

Patel v Minister for Immigration and Border Protection [2015] FCAFC 22, (2015) 145 ALD 566

Plaintiff M64/2015 v Minister for Immigration and Border Protection [2015] HCA 50

Prodduturi v Minister for Immigration and Border Protection [2014] FCA 624, (2014) 142 ALD 550

Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002 [2003] HCA 60, (2003) 77 ALJR 1909

Re Pochi v Minister for Immigration and Ethnic Affairs (1979) 2 ALD 33; (1979) 26 ALR 247

Rich v Attorney-General (NSW) [2013] NSWCA 419

Saunders v Commissioner of Taxation (Cth) (1988) 15 ALD 353

Shell Co. of Australia Ltd v Federal Commissioner of Taxation (1930) 44 CLR 530

Sullivan v Civil Aviation Safety Authority [2014] FCAFC

93, (2014) 226 FCR 555

Sullivan v Department of Transport (1978) 1 ALD 383

Sun & Ors v Minister for Immigration & Anor [2015] FCCA 2479

Swan Television and Radio Broadcasters Ltd v Australian Broadcasting Tribunal (1985) 8 FCR 291

SZKMS v Minister for Immigration and Citizenship [2008] FCA 499

SZLVZ v Minister for Immigration and Citizenship [2008] FCA 1816

Talukder v Minister for Immigration and Citizenship [2009] FCA 916, (2009) 111 ALD 405

Tarasovski v Minister for Immigration, Local Government and Ethnic Affairs (1993) 45 FCR 570

TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd (2014) 232 FCR 361; [2014] FCAFC 83

The King v Connell; Ex parte The Hetton Bellbird Collieries Ltd (1944) 69 CLR 407

Trivedi v Minister for Immigration and Border Protection [2014] FCAFC 42, (2014) 220 FCR 169

Trives v Hornsby Shire Council [2015] NSWCA 158

Vella v Minister for Immigration and Border Protection [2015] HCA 42, (2015) 326 ALR 391

Victoria v Turner [2009] VSC 66, (2009) 23 VR 110

VUAX v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 158

Wade v Comcare [2002] FCA 289, (2002) 69 ALD 602

WAJR v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 106

Zheng v Cai [2009] HCA 52, (2009) 239 CLR 446

	Australia, Parliament, Report from the Commonwealth Administrative Review Committee, Parl Paper No 144 (1971) Australia, Parliament, Final Report from the Committee on Administrative Discretions, Parl Paper No 316 (1973)
Date of hearing:	17 February 2016
Registry:	Queensland
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	97
Counsel for the Appellants:	Mr L Karp
Solicitor for the Appellants:	Hartnett Lawyers
Counsel for the First Respondent:	Mr G Johnson SC with Mr M J Smith
Solicitor for the First Respondent:	Sparke Helmore
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice save as to costs

ORDERS

QUD 928 of 2015

BETWEEN:	**JIBO SUN** **First Appellant**
	YUECHANG TAN **Second Appellant**
	JUNHAO SUN **Third Appellant**
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **First Respondent**
	ADMINISTRATIVE APPEALS TRIBUNAL **Second Respondent**
JUDGES:	**LOGAN, FLICK AND RANGIAH JJ**
DATE OF ORDER:	**5 APRIL 2016**

THE COURT ORDERS THAT:

1. 1. The application for leave to amend the *Notice of Appeal* is refused.

2. 2. The appeal is dismissed.

3. 3. The Appellants are to pay the costs of the First Respondent.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

LOGAN J:

1 1 I have had the advantage of reading in draft the reasons for judgment of Flick and Rangiah JJ. I agree, generally, with their reasons. I agree that the appeal and the application for leave to amend the grounds of appeal should be disposed of as they propose.

2 2 Because, in my view, the rejection of the appellants' submissions entails differing from views earlier expressed by two judges in a joint judgment in the Full Court, I wish to add the following.

3 3 Given that, by its then definition in s 97 of the *Migration Act 1958* (Cth) (the Act), a "bogus document", as defined, need be nothing more than a document that the Minister reasonably suspects to have particular qualities, that term is a minor classic of Orwellianism. That hardly makes it unique in that Act. A "bogus document", as defined, may or may not in fact be bogus. Having regard to the definition, a more accurate term would be "suspected bogus document".

4 4 Even were the term more accurately aligned with its definition, a pejorative quality would remain with respect to a conclusion that a particular document was a "bogus document". It does not follow from this quality that the reaching of such a conclusion means that the process of administrative review undertaken by the Migration Review Tribunal (the Tribunal) is thereby to be assimilated with the proof of facts in the exercise of judicial power.

5 5 As was also the case with the Refugee Review Tribunal and remains the case with the Administrative Appeals Tribunal, the Tribunal's statutory charter followed a model the constitutional propriety of which was approved by the Judicial Committee in *Shell Co. of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530 (*Shell v FCT*). The Tribunal, like the Taxation Board of Review considered in *Shell v FCT*, was also "in the nature of administrative machinery" and it "may act judicially, but still remain an administrative tribunal as distinguished from a Court, strictly so-called": *Shell v FCT* (1930) 44 CLR 530 at 544-545.

6 6 Like the Board of Review the subject of *Shell v FCT*, the Tribunal was an administrative tribunal which reviewed a decision of an officer of the executive. The conduct of such review was its "core function": *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at 1127; [2009] HCA 39 at [18]. Its processes were not adversarial.

The recollection of these features of the Tribunal assists in understanding why it is that the concepts of onus and standard of proof as applicable in an exercise of judicial power by a court are, in the absence of some express statutory provision (and none is applicable here), inapt with respect to the jurisdiction it exercised.

7 7 A more recent exposition at ultimate appellate level of the differences between such an administrative review forum and a court exercising judicial power is to be found in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 282 (*Wu Shan Liang*). Terms such as onus and standard of proof are "borrowed from the universe of discourse which has civil litigation as its subject" and "[t]he present context of administrative decision-making is very different".

8 8 The express statutory provision that the Tribunal was not bound by the rules of evidence also meant that, even to use the term, "evidence" in connection with its discharge of its duty to review a decision of the Minister was apt to mislead, unless intended to be understood at a general level of abstraction, rather than in a more narrow, technical sense.

9 9 These features of the Tribunal's jurisdiction form part of the reasons why, in my view, the learned Federal Circuit Court judge was correct in regarding as misplaced, the reliance before him by the present appellants on *Jasbeer Singh v Minister for Immigration and Ethnic Affairs* (unreported, Federal Court of Australia, Sackville J, 6 December 1994) (*Singh*) and *NBDY v Minister for Immigration and Multicultural Affair*s [2006] FCAFC 145 (*NBDY*), (Branson and Stone JJ).

10 10 *Singh* concerned an exercise of judicial power under the jurisdiction conferred on this Court by s 39B of the *Judiciary Act 1903* (Cth) and in respect of the then definition of "bogus document" in the former s 20(15) of the Act. That definition, as Flick and Rangiah JJ expose, was cast in very different terms to that found in s 97 and relevant to the present case. Further, given that difference and that it was judicial power which had been invoked, and that the rules of evidence applied to an exercise of that power, the references in that case by Sackville J to an onus of proving a document to be "bogus" as then defined, to that onus falling upon the Minister and to a need to consider the adverse consequences which would follow before concluding that a document was "bogus" are unremarkable. They are also irrelevant to the exercise of an administrative review power entailing reference to the term "bogus document" as differently defined.

11 11 *Tarasovski v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 570 (*Tarasovski*) is an earlier case which concerned an exercise of judicial power and the former s 20 of the Act. In that case, Wilcox J expressed like views to those of Sackville J in relation to the standard of proof.

12 12 *Singh* and *Tarasovski* were each cited as supporting authorities in the passage from the joint judgment of Branson and Stone JJ *NBDY* at [31], referred to by the learned primary judge at [21] of his judgment and also by Flick and Rangiah JJ in their judgment in this appeal. It was this passage in *NBDY* upon which the appellants particularly relied. An appreciation that each of the earlier cases cited concerned an exercise of judicial, not administrative, power and a different definition of "bogus document" is not, with respect, evident in this passage of the joint judgment in *NBDY* at [31] in the reference to "onus" or, for that matter, at [29] in the joint judgment in that case, where there is reference to "the correct standard of proof".

13 13 *NBDY* arose against the background of an exercise of an administrative review jurisdiction and in respect of the "bogus document" definition found in s 97 of the Act. In the absence of some particular statutory deviation from the generally prevailing position, to use the term "onus" or "standard of proof" in relation to a proceeding in the Tribunal is, truly, to borrow "from the universe of discourse which has civil litigation as its subject".

14 14 Even though one ought not lightly, in the exercise of appellate jurisdiction, depart from views earlier expressed in a joint judgment in the Full Court, I cannot, for the reasons given, accept that the views expressed in *NBDY* about "onus" and "the correct standard of proof" are correct.

15 15 Another reason why the appellants' reliance on *NBDY* is misplaced is, as Flick and Rangiah JJ explain, the language of Public Interest Criterion (PIC) 4020 and the legislative context in which it falls to be applied are different from that which prevailed when *Singh* and *Tarasovski* were decided. The criterion is engaged when there is evidence (in the general level of abstraction sense of that word) before the Minister that a bogus document (as defined) has been given or caused to be given "to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth", not when there is evidence that any of the appellants knew that a document given or caused to be given was false or misleading: cf *Cameron v Holt* (1980) 142 CLR 342.

16 16 In *Re Pochi v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33, Brennan J, in a case concerning the making of adverse findings touching upon an individual's possible deportation and in his then capacity as President of the Administrative Appeals Tribunal, adverted to a well-known passage in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 (*Briginshaw*) about not acting on inexact proofs. A subsequent appeal against his Honour's decision was dismissed: *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41 (*Pochi*). In that appeal, Deane J (with whom Evatt J agreed) stated (at 62):

> In my view, the Tribunal was bound, as a matter of law, to act on the basis that any conduct alleged against Mr Pochi which was relied upon as a basis for sustaining the deportation order should be established, on the balance of probability, to its satisfaction by some rationally probative evidence and **not merely raised before it as a matter of suspicion or speculation or left, on the material before it, in the situation where the Tribunal considered that, while the conduct may have occurred, it was unable to conclude that it was more likely than not that it had**. It seems to me that this conclusion follows, as a matter of law, from the authorities referred to and the reasoning advanced by the Tribunal to establish the proposition as a general principle to be observed by it as a matter of administrative practice.
>
> [Emphasis added]

17 17 This passage from *Pochi* might perhaps be thought to support what was said in *NBDY* at [29] and [31]. But the pejorative quality in concluding that a document is a "bogus document" as defined is about the document, not about the applicant or any other person's state of knowledge and, even then, all that need be present is material to raise a reasonable suspicion.

18 18 In *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555; [2014] FCAFC 93 (*Sullivan v CASA*), I considered that, in the making of grave findings concerning individuals, this passage from *Pochi* dictated that the Tribunal ought, expressly or by necessary implication and by analogy, as had Brennan J, to advert to the observations in *Briginshaw*. Yet, as Flick and Perry JJ observe in their joint judgment in *Sullivan v CASA*, *Briginshaw* was a case concerning a rule of evidence in the exercise of judicial power and the Administrative Appeals Tribunal's governing statute, like that under present consideration, expressly provides that the Tribunal is not bound by those rules.

19 19 On reflection, it may be that the better way to view what was stated by Deane J in *Pochi* is that an administrative decision-maker in the position of the Tribunal must act on material which is rationally probative of its factual conclusion and, unless the statutory touchstone for that conclusion admits of it, material which rises no higher than raising a suspicion supporting that factual conclusion is no foundation for such a conclusion. That

would accord with observations, albeit each made in the context of review for jurisdictional error, in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; [2010] HCA 16 and, on review of a decision for unreasonableness, in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18.

20 20 That may still not mean that a Tribunal faced with a need to make a factual finding carrying grave consequences for an applicant would commit an error of law by adverting, by analogy, to *Briginshaw* about a need not to make such a finding lightly or on the basis of inexact proofs. Very difficult questions might, though, arise if, having so done, the Tribunal, for example, chose not to make that finding even though there was some material before it which supported the making of such a finding or, if, in contrast, it made such a finding on the basis of some material in the face of much other material to the contrary. At present, answering these questions other than at ultimate appellate level would be resolved by the application of observations made by Mason CJ in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-356 (*Bond*): *TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 at 391; [2014] FCAFC 83 at [97] – [98]. Unlike the position reached in some English cases, referred to by Mason CJ in *Bond*, that would preclude the finding of an error of law on the basis of insufficient evidence, as opposed to no evidence, for a finding of fact. For the position in Australia to be the same as it is now in England would be a matter for the High Court.

21 21 However this may be, all that is necessary to resolve the present appeal is to appreciate that the language of PIC 4020 and s 97 of the Act are different to cases where it is necessary to be satisfied that a particular document was false and that an applicant knew of that falsehood. There is no room, even by analogy, for regard to *Briginshaw* in this case. All that is necessary is that the material upon which the Tribunal chose to act admit, reasonably, of the forming of a suspicion in the sense described in *George v Rockett* (1990) 170 CLR 104. As Flick and Rangiah JJ explain, the learned primary judge was not in error in concluding that the Tribunal, for the reasons which it gave, was entitled to form the view that there was such material.

I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan.

Associate:

Dated: 5 April 2016

REASONS FOR JUDGMENT

FLICK AND RANGIAH JJ:

22 22 In January 2010 the First Appellant, Mr Jibo Sun, lodged an application with the then Department of Immigration and Citizenship for a Business Skills (permanent) (Class DF) visa. Included in that application were applications by Mr Sun's wife and child. They are, respectively, the Second and Third Appellants.

23 23 The application made by Mr Sun was refused by a delegate of the Minister in May 2010. The delegate concluded that Mr Sun did not meet the requirements imposed by cl 892.211 of Sch 2 of the *Migration Regulations 1994* (Cth) (the "*Migration Regulations*").

24 24 An application seeking review of the delegate's decision was lodged with the then Migration Review Tribunal in June 2010. That Tribunal affirmed the delegate's decision and published reasons for its decision in June 2013. One of the findings made by the Tribunal was that the then applicants had "*given the Tribunal bogus documents in connection with the application*". The Tribunal went on to conclude that the then applicants "*do not satisfy* [*Public Interest Criterion*] *4020(1)(a)*".

25 25 An *Application* seeking judicial review of the Tribunal's decision was filed with the Federal Circuit Court of Australia in July 2013. An *Amended Application* was filed in September 2013 and a *Further Amended Application* was filed in March 2014. That Court dismissed the *Further Amended Application* in September 2015: *Sun & Ors v Minister for Immigration & Anor* [2015] FCCA 2479.

26 26 A *Notice of Appeal* was filed in this Court in October 2015. The Appellants shortly before the hearing foreshadowed that they wished to amend their *Grounds of Appeal* such that the *Grounds of Appeal* were to be expressed as follows, with the proposed amendment underlined (without alteration):

> 1. The Court Below erred in holding that it is inappropriate to consider that there is a legal onus or burden of proof on the Migration Review Tribunal arising from PIC 4020 (Cl. 4020 of Schedule 4 to the *Migration Regulations*).
>
> 2. The Court should have found that:
>
> (a) (a) PIC 4020 imposed an onus of proof on, in this case, the Tribunal to ascertain whether there was evidence, in the sense of sufficiently probative information, that the appellant

had given, or caused to be given to the Migration Review Tribunal, a bogus document or information that is false or misleading in a material particular; and

(b) (b) that that onus had not been discharged.

4. 3. …

5. 4. The Court erred in failing to find that the Migration Review Tribunal had impermissibly imposed an onus of proof on the appellant to adduce corroborative evidence to rebut its findings of fact.

Ground 3 was formally abandoned. Proposed *Ground 4* was not an argument advanced before the Federal Circuit Court. It was a new argument sought to be raised for the first time before this Court on appeal. The Respondent Minister opposed leave being granted to amend. Without resiling from the *Grounds of Appeal* as formulated, Counsel for the Appellants acceded to the proposition canvassed during his oral submissions that in one way or another his principal contention was that:

> Upon the materials before the Tribunal there was no evidence or no probative evidence upon which the Tribunal could reasonably suspect that the documents were "bogus documents".

27 27 For the reasons expressed below, it is concluded that:

0 • the existing *Grounds 1* and *2* are misconceived and are to be rejected;

1 • leave to amend to raise the new *Ground 4* should be refused; and

2 • the appeal should be dismissed with costs.

THE STATUTORY SCHEME, BOGUS DOCUMENTS & PIC 4020

28 28 The decision-making tasks under consideration require attention primarily to be given to s 65 of the *Migration Act 1958* (Cth) (the "*Migration Act*") and *Public Interest Criterion 4020*. But other statutory provisions also assume relevance.

29 29 Section 65 provides in relevant part as follows:

> … after considering a valid application for a visa, the Minister:
>
> (a) if satisfied that:
>
> …
>
> (ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and
>
> …
>
> is to grant the visa; or
>
> (b) if not so satisfied, is to refuse to grant the visa.

30 30 One of the criteria in respect to which the Minister was required to be "*satisfied*" for the purposes of s 65(1)(a)(ii) was cl 892.223 of Sch 2 to the *Migration Regulations*. That criterion provided in relevant part as follows:

> The applicant:
>
> (a) Satisfies public interest criteria … 4020 …; and
>
> …

31 31 *Public Interest Criterion 4020*, found within Sch 4 to the *Migration Regulations*, provided at the relevant time as follows:

> 4020
>
> (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
>
> (a) the application for the visa; or
>
> (b) a visa that the applicant held in the period of 12 months before the application was made.
>
> (2) …
>
> (3) To avoid doubt, subclauses (1) and (2) apply whether the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
>
> (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
>
> (a) compelling circumstances that affect the interests of Australia; or
>
> (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
>
> justify the granting of the visa.
>
> (5) In this clause:
>
> ***Information that is false or misleading in a material particular*** means information that is:
>
> (a) false or misleading at the time it is given; and
>
> (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.
>
> Note: Regulation 1.03 defines ***bogus document*** as having the same meaning as in section 97 of the Act.

32 32 The term "*bogus document*" was at the time defined in s 97 of the *Migration Act* as follows:

> ***Bogus document,*** in relation to a person, means a document that the Minister reasonably suspects is a document that:
>
> (a) purports to have been, but was not, issued in respect of the person; or
>
> (b) is counterfeit or has been altered by a person who does not have authority to do so; or
>
> (c) was obtained because of a false or misleading statement, whether or not made knowingly.

As the *Note* to *Public Interest Criterion 4020* makes clear, reg 1.03 of the *Migration Regulations* provides that the phrase "*bogus document*" as employed in the *Regulations* has the same meaning as previously set forth in s 97.

33 33 The application of these provisions had the consequence that the Minister (and the Tribunal standing in the shoes of the Minister) was to grant the visa if "*satisfied*" (s 65(a)) that the applicant "*satisfie*[*d*] *public interest criteria ... 4020*" (cl 892.223). And to satisfy that criterion there had to be "*no evidence*" that an applicant had given to the Minister a "*bogus document*…". A "*bogus document*" was one that the Tribunal "*reasonably suspect*[*ed*]" fell within the definition in s 97. That phrase, accordingly, did not necessarily bear its normal meaning but rather the meaning as statutorily defined.

34 34 In unravelling these provisions, it is relevantly necessary to give content to the statutorily imposed requirements that a decision-maker:

3 • be "*satisfied*" that the criteria had been satisfied; and

4 • has before him "*no evidence*" that a "*bogus document*" had been given to the Minister.

It is, of course, the particular statutory context in which these requirements are imposed that primarily dictates the content of each requirement. Central to the present statutory context are these two concepts of the Minister or the Tribunal being "*satisfied*" and that of a "*bogus document*".

35 35 For the purposes of s 65(1)(a)(ii) and cl 892.223, the requirement imposed upon the Minister is that he must either grant or refuse a visa application by reference to whether or not he is "*satisfied*" or "*not so satisfied*" of the matters there stated.

36 36 A statutory requirement to form an "*opinion*" confers no uncontrolled power. It vests the function of forming an "*opinion*" in the designated decision-maker in accordance with law: *The King v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432. Latham CJ there expressed the now well-recognised constraints as follows:

> It is therefore well settled that if a statute provides that a power may be exercised if a person is of a particular opinion, such a provision does not mean that the person may act upon such an opinion if it is shown that he has misunderstood the nature of the opinion which he is to form. Unless such a rule were applied legislation of this character would mean that the person concerned had an absolutely uncontrolled and unlimited discretion with respect to the extent of his jurisdiction and could make orders which had no relation to the matters with which he was authorized to deal. It should be emphasized that the application of the principle now under discussion does not mean that the court substitutes its opinion for the opinion of the person or authority in question. What the court does not do is to inquire whether the opinion required by the relevant legislative provision has really been formed. If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational, or not bona fide.

See also: *Fraser v Health Care Complaints Commission* [2015] NSWCA 421 at [42] per Basten JA (Ward and Leeming JJA agreeing).

37 37 No requirement is imposed upon the Minister by these provisions to make a "*determination*" as opposed to reaching a state of "*satisfaction*": *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271 per Brennan CJ, Toohey, McHugh and Gummow JJ; *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50 at [30] per French CJ, Bell, Keane and Gordon JJ.

38 38 The statutory requirement that it is for the administrative decision-maker to be "*satisfied*" is subject to the same constraint. Such a statutory requirement leaves to the decision-maker a freedom to make such decision as he considers appropriate – but a decision reached in accordance with law. A decision-maker's state of "*satisfaction*" does not leave his decision unexaminable: *Avon Downs Pty Ltd v Commissioner of Taxation (Cth)* (1949) 78 CLR 353 at 360. Dixon J there observed in an oft-repeated passage:

> But it is for the commissioner, not for me, to be satisfied of the state of the voting power at the end of the year of income. His decision, it is true, is not unexaminable. If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some such misconception. If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law.

See also: *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16 at [104], (2010) 240 CLR 611 at 639 per Crennan and Bell JJ; *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11 at [5] per Allsop CJ.

39 39 A discretionary power conferred in terms of an administrative decision-maker being required to reach a state of "*satisfaction*", it has thus long been recognised, does not confer an arbitrary power or a power that is unexaminable: *Buck v Bavone* (1976) 135 CLR 110 at 118 to 119. Gibbs J there observed:

> … It is not uncommon for statutes to provide that a board or other authority shall or may take certain action if it is satisfied of the existence of certain matters specified in the statute. Whether the decision of the authority under such a statute can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which cannot be effectively reviewed by the courts …

See also: *Trives v Hornsby Shire Council* [2015] NSWCA 158 at [53] per Basten JA (Macfarlan and Meagher JJA agreeing); *Rich v Attorney-General (NSW)* [2013] NSWCA 419 at [20] per Leeming JA (Bathurst CJ and Beazley P agreeing).

40 40 When considering, for example, "*the facts to be established*" for the purposes of reaching a state of "*satisfaction*" as to whether "*there are reasonable grounds for suspecting*" that there may be on premises anything which may afford evidence of an offence for the purposes of issuing a search warrant pursuant to s 697 of *The Criminal Code* (Qld), Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ in *George v Rockett* (1990) 170 CLR 104 at 115 to 116 observed:

> *The facts to be established*
>
> In considering the sufficiency of a sworn complaint to show reasonable grounds for the suspicion and belief to which s. 679 refers, it is necessary to bear in mind that suspicion and belief are different states of mind … and the section prescribes distinct subject matters of suspicion on the one hand and belief on the other. The justice must be satisfied that there there are reasonable grounds for suspecting that "there is in any house, vessel, vehicle, aircraft, or place – Anything" and that there are reasonable grounds for believing that the thing "will ... afford evidence as to the commission of any offence".
>
> Suspicion, as Lord Devlin said in *Hussien v Chong Fook Kam* [1970] AC 942, at 948, "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.'" The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. In *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, a question was raised as to whether a payee had reason to suspect that the payer, a debtor, "was unable to pay [its] debts as they became due" as that phrase was used in s. 95(4) of the *Bankruptcy Act* 1924 (Cth). Kitto J said (at 303):
>
> > "A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence', as Chambers's

> Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which 'reason to suspect' expresses in sub-s. (4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the subsection describes - a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors."

> The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.

Citing *George v Rockett*, Gageler J in *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50 observed:

> [64] A statutory requirement that a decision-maker arrive at a state of satisfaction as a precondition to an exercise of a statutory power, like a requirement that a decision-maker hold a belief as a precondition to an exercise of a statutory power, necessitates that the decision-maker "feel an actual persuasion" — "an inclination of the mind towards assenting to, rather than rejecting, a proposition"…

41 41 The concept of a "*bogus document*" is one which has frequently been employed by the Commonwealth legislative draftsman.

42 42 One instance of the phrase being employed occurs in *Jasbeer Singh v Minister for Immigration and Ethnic Affairs* (unreported, Federal Court of Australia, Sackville J, 6 December 1994). Section 20(2) of the *Migration Act* as it was then drafted provided that the section applied if a "*person produced a bogus document*". Section 20(15) at the time provided the following definition of a "*bogus document*":

> In this section:
>
> "**bogus document**", in relation to a person, means an entry permit, certificate, passport, visa, identification card or any other document that:
>
> (a) was not issued to the person;
>
> (b) was forged or fraudulently altered; or
>
> (c) was obtained by the making of a false or misleading representation;

It was in that statutory context that Sackville J observed:

> *The Nature of the Court's Jurisdiction*
>
> The parties were in broad agreement as to the nature of the Court's jurisdiction and (to a certain extent) the principles on which it was to be exercised in the present case. The question of whether a non-citizen committed any of the acts specified in s.20(2)(b) of the Act, as it

> stood at the relevant times, is not dependent on the state of mind of the Minister or his officers. Rather it is a matter for objective assessment, on the evidence before the Court …
>
> …
>
> *Burden of Proof*
>
> Because of gaps in the evidence in this case, the onus of proof is of some significance. On this question the parties differed. Ms McCallum submitted, correctly in my opinion, that the burden lies upon the Minister of proving the facts demonstrating the falsity of the statements made by the applicant …
>
> Not only is the onus of establishing the facts on the Minister, but in applying that onus it is necessary to consider the serious consequences of falling within s.20(2). As Wilcox J said in *Tarasovski v Minister for Immigration, Local Government and Ethnic Affairs*, (1993) 45 FCR 570, at 572-573, because of these consequences
>
> > "a court should find that the person has contravened s. 20 only where the evidence establishes that proposition to a high degree of satisfaction: see *Briginshaw v Briginshaw* (1938) 60 CLR 336, at 361-362; *Rejfek v McElroy* (1965) 112 CLR 517, at 521-522."
>
> …

43 43 That decision and the concept of a "*bogus document*" re-emerged in the later decision of Branson and Stone JJ in *NBDY v Minister for Immigration & Multicultural Affairs* [2006] FCAFC 145. At the time of that decision, s 103 of the *Migration Act* provided that a non-citizen "*must not give ... the Minister ... a bogus document*…". A "*bogus document*" was then defined as previously set forth in s 97 of the *Migration Act*. Their Honours there concluded:

> [31] The Tribunal correctly directed itself as to the level of proof required in finding that the appellants had made false statements and the fact that the onus of discharging this burden lay on the Minister. In doing so it appropriately cited *Jasbeer Singh v Minister for Immigration and Ethnic Affairs* [1994] FCA 1011 and *Tarasovski v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 570. There is nothing in the Tribunal's reasons to suggest that it did not apply the test it identified …

44 44 When considering *Public Interest Criterion 4020* and the definition of a "*bogus document*", Buchanan J in *Trivedi v Minister for Immigration and Border Protection* [2014] FCAFC 42, (2014) 220 FCR 169 at 177 to 178 concluded:

> [33] In my view, it should be accepted that an element of fraud or deception is necessary in order to attract the operation of PIC 4020. To take the example of bogus documents, a counterfeit document is not produced accidentally. Similarly, to charge that a statement is false is not to say only that it is wrong. The accusation potentially imports some element of knowledge or intention on somebody's part, and in my view does so in the present context.

A little later, his Honour further observed:

> [49] For the reasons I have already given, it should be accepted that PIC 4020 is directed to information or documents which are purposely untrue. It seems to me to be clear from the same analysis that the purpose of PIC 4020 was to render visa applicants ultimately responsible for the veracity of the information and documents supplied to support the application. Although the limited terms of the waiver (and therefore any discretion to excuse

> non-compliance) make it apparent that innocent errors are not the focus of attention, it is equally clear that PIC 4020 is directed at the overall integrity of the visa system and as a bulwark against deception and fraud from any quarter associated with a visa applicant. It is not inconsistent with a coherent public policy to make a visa applicant ultimately responsible for purposely untrue material provided with a visa application. It would be an intolerable burden on the administration of the visa system to require that those assessing visa applications not only discover that information or documents are false in a material particular, but also that the visa applicant who provided them knew them to be so. In many cases that would be impossible and would defeat the apparent intent of the provision: (2014) 220 FCR at 179 to 180.

Chief Justice Allsop and Rangiah J agreed with Buchanan J. This decision has since been applied by Barker J in *Kaur v Minister for Immigration and Border Protection* [2014] FCA 1276 at [54] to [56] and by the Full Court in *Patel v Minister for Immigration and Border Protection* [2015] FCAFC 22 at [32], (2015) 145 ALD 566 at 572 to 573 per Flick J (Edmonds J agreeing).

45 45 Finally, and when considering a criterion that "*no evidence has become available since the time of application that the information given or used ... is false or misleading*", Edmonds J in *Talukder v Minister for Immigration and Citizenship* [2009] FCA 916, (2009) 111 ALD 405 at 411 observed:

> [20] In my view, the word "evidence" is used, in contradistinction to the word "information", which is also used in the clause, to impose a requirement that, whatever facts are conveyed by the material relied upon to establish that the information given to meet the requirements of item 1128CA(3)(k) of Sch 1 was false or misleading in a material particular, are sufficiently probative to lead to that conclusion.

THE TRIBUNAL DECISION

46 46 On the facts of the present case, the Migration Review Tribunal was "*satisfied*" that there were eleven documents which it "*reasonably suspected*" fell within the definition in s 97.

47 47 Albeit not in a manner which comfortably fell within the ambit of *Grounds 1* or *2*, or proposed *Ground 4*, Counsel for the Appellants contended that for the purposes of *Public Interest Criterion 4020* there was "*no evidence*" – being no evidence of a sufficiently reliable or "*probative*" nature (*Talukder* [2009] FCA 916 at [20], (2009) 111 ALD at 411) – that any of the documents were "*bogus documents*".

48 48 The case for the Respondent Minister was that, rather than there being "*no evidence*" that "*bogus documents*" had not been given to the Minister, there was an abundance of "*evidence*" upon which the Tribunal could reach its "*reasonable suspicion*" that the eleven documents were indeed "*bogus*". The case for the Minister was that unlike the statutory

provisions in *Jasbeer Singh*, there was no requirement to establish that one or other of the documents was a "*bogus document*"; the requirement that was imposed was the much lower standard of simply requiring the Minister (or the Tribunal) to "*reasonably suspect*" that a document was "*bogus*", the factual foundation for that state of "*reasonable suspicion*" being a standard less than that required "*to ground a belief*" (*George v Rockett* (1990) 170 CLR at 115 to 116).

49 49 To unravel these competing submissions, it is prudent briefly to set forth at least part of the reasoning of the Tribunal.

50 50 In applying these provisions, the Tribunal relevantly concluded that there were eleven documents which fell within the description of "*bogus documents*" (without alteration):

> 109. The Tribunal has considered the 11 documents submitted by the applicants to the Tribunal and the matching document that was submitted by either Mr Wenxing Ma and/or Mr Wenwei Ma in their respective applications for Class DF visas lodged with the Department in February 2009. The Tribunal has considered the applicants' submission that there is no evidence that any of the documents have been altered. The Tribunal has considered his evidence that the documents may have been signed by Mr Wenxing Ma, Mr Wenwei Ma and/or Mr Sun depending on their location, whether in Australia or China and this meant there may be multiple versions of the same document containing different signatures. The Tribunal has considered Mr Sun's evidence that if he was not in Australia, it would be signed by either Mr Wenxing Ma or Mr Wenwei Ma and then sent by facsimile or email to him in China for his signature. The Tribunal has considered the evidence of Mr Zhou, who was employed at the Cherrabah Resort since January 2008, that this was the practice he adopted. The Tribunal has considered the evidence of Mr Wenxing Ma, Mr Wenwei Ma, Mr Cheng Zhou and Mr Zhan Su about Mr Sun's role in the businesses. The Tribunal had considered the submission that the documents are insignificant and that the Tribunal should consider all of the evidence and not just focus on a small number of documents.

The references to Mr Wenxing Ma and Mr Wenwei Ma are references to the two persons whom Mr Sun claimed were co-owners in a resort business. The reasons for decision of the Tribunal thereafter go on to address each of the eleven documents. By way of example, in respect to the first document it concluded as follows:

> 110. The Tribunal has considered the document marked "1" which was given to the Department in the case of Mr Wenxing Ma (CLF2009/12890), Mr Wenwei Ma (CLF2009/14571) and the same document given to the Tribunal by Mr Sun. In the case of Mr Wenxing Ma, his signature appears above the handwritten date of 22 December 2005; in the application of Mr Wenwei Ma, his signature and that of Mr Wenxing Ma appear above the date 22 December 2005; and in the document given to the Tribunal, the signature of Mr Wenxing Ma appears and in the place where Mr Wenwei Ma had signed, the signature of Mr Sun appears.
>
> 111. The Tribunal does not accept the applicants' explanations for the appearance of his signature on the document which was submitted to the Tribunal for the following reasons. The Tribunal does not accept that either of the documents submitted in the cases of Mr Wenxing Ma or Mr Wenwei Ma were sent by fax or scanned and sent by email because there is no indication on the face of those documents as to any facsimile record or that they have been scanned because all of the writing on both documents is very clear. The Tribunal finds that

> there is insufficient evidence to corroborate the explanation offered, which could include evidence of any of the relevant documents containing original signatures or all the versions of the same document containing all or any of the original signatures.

It is unnecessary to extract the manner in which the Tribunal proceeded to conclude that the remaining documents were also "*bogus documents*" and that the explanations provided by the claimants were to be rejected.

51 51 It is concluded that no error emerges from the manner in which the Tribunal proceeded to reach its conclusions in respect to these documents. Neither as a matter of general principle, nor by reason of any statutory provision peculiar to the practices and procedures of the former Migration Review Tribunal, was any "*legal onus or burden of proof*" imposed upon the Tribunal as alleged in the *Grounds of Appeal*.

THE PRACTICE & PROCEDURE OF THE MIGRATION REVIEW TRIBUNAL

52 52 In making these findings and in reaching these conclusions, the Migration Review Tribunal in the present case was exercising powers and discharging functions previously set forth in ss 349 and 353 of the *Migration Act*. Those provisions have now been amended following the incorporation of the Migration Review Tribunal into the Administrative Appeals Tribunal by the *Tribunals Amalgamation Act 2015* (Cth).

53 53 Sections 349 and 353 are fundamental to a proper resolution of the *Grounds of Appeal* as sought to be recast by the Appellants.

54 54 As at the date of the decision of the Tribunal in the present proceeding, s 349 of the *Migration Act* provided as follows:

> **Powers of the Migration Tribunal**
>
> (1) The Tribunal may, for the purposes of the review of an MRT-reviewable decision, exercise all the powers and discretions that are conferred by this Act on the person who made the decision.
>
> (2) The Tribunal may:
>
> (a) affirm the decision; or
>
> (b) vary the decision; or
>
> (c) if the decision relates to a prescribed matter – remit the matter for reconsideration in accordance with such directions or recommendations of the Tribunal as are permitted by the regulations; or
>
> (d) set the decision aside and substitute a new decision.
>
> (3) If the Tribunal:
>
> (a) varies the decision; or

> (b) sets aside the decision and substitutes a new decision;
>
> the decision as varied or substituted is taken (except for the purpose of appeals from decisions of the Tribunal) to be a decision of the Minister.
>
> (4) To avoid doubt, the Tribunal must not, by varying a decision or setting a decision aside and substituting a new decision, purport to make a decision that is not authorised by the Act or the regulations.

This section mirrored s 426 which previously set out the powers of the Refugee Review Tribunal. Section 353 then provided as follows:

> **353 Tribunal's way of operating**
>
> (1) The Tribunal shall, in carrying out its functions under this Act, pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.
>
> (2) The Tribunal, in reviewing a decision:
>
> (a) is not bound by technicalities, legal forms or rules of evidence; and
>
> (b) shall act according to substantial justice and the merits of the case.

Section 353, it may be noted, was in much the same terms as s 420 which set forth the "*way of operating*" of the Refugee Review Tribunal.

55 55 Such statutory provisions were unique neither to the former Migration Review Tribunal nor the Refugee Review Tribunal.

56 56 Even prior to its incorporation into the Administrative Appeals Tribunal, ss 353 and 420 (for example) had their counterpart in s 33 of the *Administrative Appeals Tribunal Act 1975* (Cth) (the "*Administrative Appeals Tribunal Act*"). Section 33(1) now provides as follows:

> In a proceeding before the Tribunal:
>
> (a) the procedure of the Tribunal is, subject to this Act and the regulations and to any other enactment, within the discretion of the Tribunal;
>
> (b) the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit; and
>
> (c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.

And, following a statutory amendment in 2015, s 2A of the *Administrative Appeals Tribunal Act* now provides as follows:

> **Tribunal's objective**
>
> In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that:

(a) is accessible; and

(b) is fair, just, economical, informal and quick; and

(c) is proportionate to the importance and complexity of the matter; and

(d) promotes public trust and confidence in the decision-making of the Tribunal.

The comparability between the provisions of the *Migration Act* and those of the *Administrative Appeals Tribunal Act* is not surprising.

57 57 Section 33, for example, was subsequently used as a model legislative provision which found its way into State statutory provisions such as the *Civil and Administrative Tribunal Act 2013* (NSW), s 38(2); the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 98 (see: *Victoria v Turner* [2009] VSC 66 at [57] to [58], (2009) 23 VR 110 at 125 per Kyrou J); and the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 28(3).

58 58 The desire for administrative tribunals to be free from the constraints which had long been associated with the common law rules of evidence and the adversarial mode of adjudication in judicial forums may be traced back in Australian jurisprudence, in particular, to at least the *Report* of the Kerr Committee: Australia, Parliament, Report from the Commonwealth Administrative Review Committee, Parl Paper No 144 (1971). Paragraph [295] of that *Report*, for instance, contained the following recommendation for the powers and procedures of what was then envisaged as an "*Administrative Review Tribunal*":

> 295. When a date was set for hearing, each of the parties would be given adequate notice of the hearing and be served with a copy of the record of the matter to date. The Tribunal would be empowered to dismiss summarily an application for review at any stage after commencement of the hearing. The following matters would also be provided for as to procedure at the hearing:
>
> (*a*) a party to the hearing may be heard in person or by counsel or solicitor, or with the consent of the Tribunal by other authorised representative;
>
> (*b*) oral or documentary evidence may be received;
>
> (*c*) in order to secure the attendance of witnesses and production of documents the Chairman of the Tribunal on the application of any party to the hearing may issue summonses to give evidence or to produce documents, as the case may require;
>
> (*d*) the Tribunal may require, but shall not be obliged to require, evidence to be given on oath;
>
> (*e*) where disputed facts are in issue witnesses may be examined, cross-examined and re-examined but only to the extent necessary in the opinion of the Tribunal to ensure full disclosure and investigation of the facts;
>
> (*f*) argument shall be permitted on questions of law, fact, discretion and application of policy;
>
> (*g*) the rules of evidence applying in courts of law shall not apply but the

> Tribunal shall exclude irrelevant, immaterial or unduly repetitious evidence; and
>
> (*h*) the Tribunal shall inform itself as to the issues involved in such manner as it thinks fit, but procedures should be adopted to ensure that all material facts and matters of expert opinion are brought to the attention of the parties before a final decision is reached and parties should have the right to make submissions to the Tribunal thereon.
>
> 296. Except as provided for in the enabling Act, and in statutory rules made thereunder, the Tribunal should be permitted to regulate its own procedure.

The recommendation was endorsed by the *Final Report*, being the report of the Bland Committee: Australia, Parliament, Final Report from the Committee on Administrative Discretions, Parl Paper No 316 (1973). Paragraph [172] of the *Final Report* provided in part as follows:

> 172. While, in the broad, we agree with the proposals in paragraphs 294 et seq of the Kerr Committee Report about the powers and procedures of its proposed tribunal, which are elaborated in Chapter 16 of its Report, and, therefore, with their applicability to our proposed Tribunals, our own views, in a number of respects, either supplement or qualify those proposals, as will be seen below:—
>
> …
>
> (j) paragraphs 295(g) and (h) and 334 and other references in the Kerr Committee Report lead us to emphasise that the code of procedure for the Tribunals should clearly spell out that they are not bound to follow adversary procedures. We believe that, in most cases, the investigative or inquisitorial process would be most apposite. It should have the added consequences of shorter hearings, less need of legal representation and hopefully of better decisions, the more so when the Tribunals are acting as an extension of the administrative process. This is not to say that, in some cases, the adversary process might not be the best way of testing facts. Difficult though it may be for the legal profession to accommodate itself to the processes we have sketched, the real burden of achieving this will, under our proposals, rest upon the president of the Tribunal and Chairmen of Divisions. It will fall to them to make or mar the process.

59 59 It should not be forgotten, however, that the provisions which were later incorporated as s 33 of the *Administrative Appeals Tribunal Act* were not the first such provisions. Much earlier, for example, the War Pensions Entitlement Appeal Tribunal had been established by s 45 of the *Australian Soldiers' Repatriation Act 1920-1943* (Cth). By reason of s 47 of that Act the Tribunal was not "*bound by any rules of evidence*". Section 47(2), it may be noted, expressly addressed the question of whether there was any onus upon a claimant "*to furnish proof to support his claim*". Writing in 1944, a Sydney Barrister and a former soldier from the 1914-1918 conflict and at one time a soldier attached to the Anzac Wireless Section, Mr G J O'Sullivan, wrote:

> The onus imposed by *section 47* of the Repatriation Act approximates to the burden of proof in a criminal trial. As in a criminal trial, too, the burden never shifts from the Commission or Board. In appeals before the Tribunal, therefore, the Commission must carry the burden from

> beginning to end. It must establish its case to the satisfaction of the Tribunal and beyond doubt. If the Commission's case discloses any doubt, the appellant need only point this out to establish his own case. He may submit that he has no case to answer: GJ O'Sullivan, *War Pensions Entitlement Appeals* (1944), pp 35-6.

See also: *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93 at [88], (2014) 226 FCR 555 at 577 to 578 per Flick and Perry JJ.

60 60 With specific reference to s 420 of the *Migration Act* and the Refugee Review Tribunal, Gleeson CJ and McHugh J in *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21 at [49], (1999) 197 CLR 611 at 628 have observed:

> [49] The relationship, or lack of it, between ss 420 and 476 was correctly explained by Lindgren J at first instance in *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* … They are intended to be facultative, not restrictive. Their purpose is to free tribunals, at least to some degree, from constraints otherwise applicable to courts of law, and regarded as inappropriate to tribunals. The extent to which they free tribunals from obligations applicable to the courts of law may give rise to dispute in particular cases, but that is another question.

Also when considering the procedures to be followed by the Refugee Review Tribunal, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ have observed in *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39, (2009) 83 ALJR 1123 at 1127:

> [18] It has been said in this Court on more than one occasion that proceedings before the Tribunal are inquisitorial, rather than adversarial in their general character. There is no joinder of issues as understood between parties to adversarial litigation. The word "inquisitorial" has been used to indicate that the Tribunal, which can exercise all the powers and discretions of the primary decision-maker, is not itself a contradictor to the cause of the applicant for review. Nor does the primary decision-maker appear before the Tribunal as a contradictor. The relevant ordinary meaning of "inquisitorial" is "having or exercising the function of an inquisitor", that is to say "one whose official duty it is to inquire, examine or investigate". As applied to the Tribunal "inquisitorial" does not carry that full ordinary meaning. It merely delimits the nature of the Tribunal's functions. They are to be found in the provisions of the *Migration Act*. The core function, in the words of s 414 of the Act, is to "review the decision" which is the subject of a valid application made to the Tribunal under s 412 of the Act.

See also: *Appellant S395 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71 at [1], (2003) 216 CLR 473 at 479 per Gleeson CJ.

ONUS OR BURDEN OF PROOF?

61 61 The references in the *Grounds of Appeal* as formulated in the *Amended Notice of Appeal* to "*onus or burden of proof*", without more, are curious.

62 62 Leaving aside any potential difference between an "*onus*" and a "*burden of proof*," as a general proposition the "*legal burden of proof is the obligation of a party to meet the requirement of a rule of law that a fact in issue be proved (or disproved) either by a*

preponderance of the evidence or beyond reasonable doubt, as the case may be": JD Heydon, *Cross on Evidence* (10th Aust ed., Butterworths, 2015), p 291.

63 63 The concept of an "*onus or burden of proof*" is a concept buried in common law rules of evidence and the practice and procedure of superior courts of law entrusted with resolving disputes between parties to litigation.

64 64 As a general proposition, administrative decision-making and decision-making by administrative tribunals is not adversarial and past attempts to blur the distinction between adversarial and administrative decision-making have vigorously been rejected: e.g., the procedures employed by administrative tribunals differ greatly from those employed in superior courts: *Saunders v Commissioner of Taxation (Cth)* (1988) 15 ALD 353 at 358. Northrop J there observed:

> Viewed in this light, it is not surprising that the procedures of the Tribunal differ greatly from court proceedings. For example, there is no provision for the filing of pleadings nor for discovery or inspection of documents. Nor is the Tribunal bound by the rules of evidence. Provision is made for there to be "parties" to the proceedings (s 30) but in a reference such as this the parties are not adversaries in the strict sense, and any argument they present constitutes material which assists the Tribunal in deciding what decision should be made. The decision of the Tribunal is not in the nature of a judgment for or against a particular party. … The Tribunal is in the shoes of the Commissioner and may use any material put before it in reaching its decision …

See also: *Clare v Australian Community Pharmacy Authority* [2015] FCA 653 at [71] per Reeves J.

65 65 Again, as a general proposition, the common law concept of "*onus of proof*" has no application to administrative decision-making. The concept is a hallmark of judicial – and not administrative – decision-making. Indeed, it would come as a surprise to many Commonwealth administrative decision-makers, including the present Minister, that there was imposed upon a Minister a legal burden or obligation to prove or disprove facts when resolving applications or claims made. It would be difficult to envisage a hallmark more reminiscent of an adversarial means of adjudication than the imposition upon a decision-maker of a "*legal onus or burden of proof*". On such an approach, unless the Minister could discharge the posited burden of proof, he could lawfully reach no requisite state of "*satisfaction*". Such a proposition only has to be stated to be rejected – at least as a general proposition.

66 66 In respect to an onus of proof, in *McDonald v Director-General of Social Security* (1984) 1 FCR 354 at 356, Woodward J, albeit in the context of addressing (in part) s 33 of the *Administrative Appeals Tribunal Act*, expressed the following general principles:

> The first point to be made is that the onus (or burden) of proof is a common law concept, developed with some difficulty over many years, to provide answers to certain practical problems of litigation between parties in a court of law. One of the chief difficulties of the concept has been the necessity to distinguish between its so-called "legal" and "evidential" aspects. The concept is concerned with matters such as the order of presentation of evidence and the decision a court should give when it is left in a state of uncertainty by the evidence on a particular issue.
>
> The use outside courts of law of the legal rules governing this part of the law of evidence should be approached with great caution. This is particularly true of an administrative tribunal which, by its statute "is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate" (AAT Act, s.33(1)(c)).
>
> Such a tribunal will still have to determine practical problems such as the sequence of receiving evidence and what to do if it is unable to reach a clear conclusion on an issue, but it is more likely to find the answer to such questions in the statutes under which it is operating, or in considerations of natural justice or common sense, than in the technical rules relating to onus of proof developed by the courts. However these may be of assistance in some cases where the legislation is silent.
>
> Whether the principles adopted by such a tribunal, arising from these various considerations, are appropriately dealt with under the heading "onus of proof", becomes a matter of choosing labels. It would probably be more convenient to avoid using that expression in cases such as the present.

These observations have subsequently not been confined to the particular statutory provisions applicable to the Administrative Appeals Tribunal and have been applied (for example) in respect to proceedings before the Victorian Civil and Administrative Tribunal (*MH6 v Mental Health Review Board & Austin Health, Royal Talbot Hospital* [2008] VSC 345 at [67]), and the Australian Broadcasting Tribunal (*Swan Television and Radio Broadcasters Ltd v Australian Broadcasting Tribunal* (1985) 8 FCR 291 at 297). It has also been acknowledged that "[g]*enerally speaking, concepts of onus of proof used in adversary proceedings are inapplicable in administrative proceedings in the social security area*": *Minister for Health v Thomson* (1985) 8 FCR 213 at 223 to 224 per Beaumont J.

67 67 Indeed, even the use of the term "*prove*" or "*proof*" has attracted criticism in an administrative law context. When considering a claim for a disability pension which had been rejected by the Repatriation Commission and which was sought to be reviewed before the Administrative Appeals Tribunal, Logan J in *Linwood v Repatriation Commission* [2016] FCA 90 has observed:

> [33] Mr Linwood was not obliged to prove to demonstration that a particular factor was present. Nor was he obliged, given the preamble in cl 9 of the [Statement of Principles], to prove that more than one specified factor existed during his service. Materially, all that was

> necessary was that there be before the Tribunal material to engender reasonable satisfaction that at least one factor had effects which were chronic in nature and caused him to feel on-going distress, concern or worry. Indeed, to use the word "prove" at all is to import into an administrative review process a term from adversarial litigation in a court. It was in Mr Linwood's interest to place before the Tribunal such evidence as he could to support the outcome which he sought but he was not subject to any formal onus so to do …

Ordinarily, a tribunal will "*be best advised to be guided by the parties in identifying the issues and to permit the parties to present their respective cases in the manner which they think appropriate*": *Sullivan v Department of Transport* (1978) 1 ALD 383 at 402 per Deane J.

68 68 Attempts to import other evidential tools which have emerged in the context of civil litigation, such as the rule in *Brown v Dunn* (1893) 6 R 67, have also been rejected in the context of decision-making by the Refugee Review Tribunal: *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002* [2003] HCA 60 at [56], (2003) 77 ALJR 1909 at 1918. Gummow and Heydon JJ there observed that the purpose of statutory provisions, such as the provision then found in s 420(2) of the *Migration Act* that the Tribunal was "*not bound by technicalities, legal forms or rules of evidence*", was "*to free bodies such as the Tribunal from certain constraints otherwise applicable in courts of law which the legislature regards as inappropriate*".

69 69 Albeit not in the specific context of considering *Public Interest Criterion 4020* or s 97 of the *Migration Act*, but in the context of proceedings before the Refugee Review Tribunal, similar, generally-expressed observations have been made regarding the inapplicability of the common law concept of onus of proof to proceedings before that Tribunal. Thus, for example, in *SZLVZ v Minister for Immigration and Citizenship* [2008] FCA 1816 Middleton J observed:

> [24] Generally, there is no onus of proof in administrative inquiries and decision making: *Yao-Jing v Minister for Immigration and Multicultural Affairs* (1997) 74 FCR 275 at 288. However, it is for an applicant to provide evidence and arguments in sufficient detail to enable the decision maker to establish the relevant facts: *Minister for Immigration and Multicultural and Indigenous Affairs v Lat* (2006) 151 FCR 214. The decision maker is not required to make the applicant's case for him or her: *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 170.
>
> [25] It is also the case that in assessing credibility, the Tribunal must be sensitive to the difficulties often faced by applicants and should give the benefit of the doubt to those who are generally credible, but are unable to substantiate all of their claims: see *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437. However, the Tribunal is not required to uncritically accept any or all of the allegations made by an applicant.

If a claimant makes a claim, be it for refugee status or otherwise, it remains for the claimant to present evidence and advance arguments adequate to enable the decision-maker to make a

decision favourable to the claimant. There is no burden upon the decision-maker to make out a case that the claimant has failed adequately to advance. Again in the context of reviewing a decision of the Refugee Review Tribunal, Kirby J in *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26, (2003) 77 ALJR 1088 at 1100 has observed:

> [78] … The Tribunal acts in a generally inquisitorial way. This does not mean that a party before it can simply present the facts and leave it to the Tribunal to search out, and find, any available basis which theoretically the Act provides for relief. This Court has rejected that approach to the Tribunal's duties. The function of the Tribunal, as of the delegate, is to respond to the case that the applicant advances …

70 70 The imposition of a "*legal onus or burden of proof*" upon a Minister would also not sit comfortably with the rejection of a generally-expressed duty upon an administrative decision-maker to make further inquiries by reason of potential deficiencies in the material relied upon by a claimant: *SZIAI* [2009] HCA 39 at [26], (2009) 83 ALJR at 1129. The Appellants' contentions failed, with respect, satisfactorily to explain why there may be no duty upon the Tribunal in the present case to make inquiries, but a "*legal onus or burden*" to obtain materials upon which it could be "*satisfied*".

71 71 Notwithstanding such repeated, generally-expressed principles which have been made in a myriad of statutory contexts as to the inapplicability of the common law concept of onus of proof in administrative decision-making, and the non-adversarial nature of administrative decision-making (e.g., *SZIAI* [2009] HCA 39 at [18], (2009) 83 ALJR at 1127), it is obviously the case that a legislative intention to make that concept applicable to administrative decision-making in a particular statutory context may be discerned from either an express legislative provision to that effect, or by necessary implication from the legislative context. The decision of Sackville J in *Jasbeer Singh,* supra, provides one instance where the form in which s 20 of the *Migration Act* was then expressed led his Honour to conclude that "*the burden lies upon the Minister of proving the facts demonstrating the falsity of the statements made by the applicant*". But the *Migration Act* has been the subject of innumerable amendments since that decision and, in particular, there is no equivalent provision to s 20 as it then was enacted. And the decision of Branson and Stone JJ in *NBDY*, with respect, does not dictate any contrary conclusion. Their Honours' reference to there being a "*burden*" on the Minister, it is respectfully considered, cannot be understood as supporting the proposition sought to be advanced by the Appellants in the present case.

72 72 These general propositions may, accordingly, be changed either by express legislative provision, or by necessary implication, to be discerned from a particular legislative context. In some statutory contexts, it may be noted, the Commonwealth Legislature has expressly stated that the Commonwealth has no "*onus of proving any matter*": e.g., *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 424 to 425 per Brennan J.

73 73 In the present case, there is no express legislative provision imposing upon the former Migration Review Tribunal any such "*onus or burden of proof*" as is now adumbrated by the Appellants.

74 74 Any such conclusion must, accordingly, be dictated by a necessary legislative implication to be discerned from the statutory context. The source of such an implication, it was bravely advocated on behalf of the Appellants, was to be discerned from:

5 • the requirement imposed by *Public Interest Criterion 4020(1)* that there be "*no evidence*"; and/or

6 • the requirement imposed by s 97 that the Minister (or the Tribunal) "*reasonably suspects*".

Notwithstanding the considerable temerity in advancing such a bold submission, it is to be summarily rejected.

75 75 In the absence of an express statutory provision imposing upon the Migration Review Tribunal an onus of proof, it is respectfully concluded that no implication should be drawn imposing such an onus upon that Tribunal by reason of either *Public Interest Criterion 4020* or s 97 of the *Migration Act.* Confined to a consideration of the statutory provisions applicable to the manner in which the Tribunal was to review such decisions as were entrusted to its jurisdiction, the implication should be not be drawn because an onus of proof would either be inconsistent with or (at the very least) not sit comfortably with:

7 • the mandate of the Tribunal to conduct a review in a manner that was "*fair, just, economical, informal and quick*" and to conduct is review functions in a manner "*not bound by technicalities, legal forms or rules of evidence*" (s 353) – the imposition of an onus upon the Tribunal having the very real potential to make proceedings before the Tribunal more adversarial than "*informal and quick*";

8 • the absence of any "*entitlement*" of a party to "*cross-examine any person*" (s 366D) – the Appellants' submission apparently being that although a party has no

entitlement to cross-examine any other person, there nevertheless remains a "*duty*" or an "*onus*" upon the Tribunal itself to cross-examine a party as to whether or not a document is a "*bogus document*" or an "*onus*" to rebut the authenticity of such a document by reference to further materials which the Tribunal has the "*burden*" to adduce or to conduct its own inquiries as to the authenticity of the documents in question (*SZIAI* [2009] HCA 39, (2009) 83 ALJR 1123); and

9 • the power conferred upon the Tribunal to "*require the Secretary to arrange for the making of any investigation … that the Tribunal thinks necessary*" (s 363(1)(d)) – the Appellants' submission necessarily being that the Tribunal can not only "*require*" the Secretary to undertake an investigation but implicitly retains an unstated power to do so itself.

If there be an onus of proof imposed upon the Tribunal, there is – presumably – no reason why *Public Interest Criterion 4020* would not impose a like onus upon the Minister. But the Appellants neither advanced such a bold submission, nor any reason why the Tribunal would be exposed to such an onus but not the Minister.

76 76 Confined to a consideration of such provisions, it is respectfully concluded that the statutory scheme is such that the Tribunal was required to undertake its review functions upon the basis of such materials as were placed before it by the parties, together with such further materials obtained pursuant to any "*investigations*" required to be undertaken by the Secretary. No implication is to be drawn placing any "*onus*" upon the Tribunal itself to undertake its own process of inquiry into those matters required to be established for a case to fall within *Public Interest Criterion 4020* or s 97 of the *Migration Act*. In the absence of an express or implied requirement to undertake inquiries, there is no generally imposed duty to do so: cf. *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39, (2009) 83 ALJR 1123. Section 420 of the *Migration Act*, it is respectfully concluded, not only frees the Tribunal from "*technicalities*" and the "*rules of evidence*", it also frees the Tribunal from the constraints imposed by the common law concept of an onus of proof drawn from civil litigation.

77 77 More broadly expressed, and approached from the context of generally-expressed principles, the same conclusion is reached. The implication sought to be drawn by the Appellants from the statutory context is also considered either to be inconsistent with, or at the very least, sitting uncomfortably with:

10 • the non-adversarial nature of administrative decision-making and the continued insistence upon the different character of judicial, as opposed to administrative, decision-making;

11 • the rejection of the notion that an onus of proof rests upon an administrative decision-maker;

12 • the rejection of the universal application to administrative decision-making of common law rules of evidence; and

13 • the rejection of an unqualified duty upon an administrative decision-maker to undertake inquiries.

To combat such generally-expressed and recognised principles, one would be highly unlikely to discern any implied legislative intention to impose such a "*legal onus or burden of proof*"; any such "*legal onus or burden of proof*" would in all likelihood have to be expressly imposed if it were the will of the Commonwealth Legislature.

78 78 At the Commonwealth level of decision-making there forever remains the necessity to distinguish between (at its most simple) administrative decision-making and the discharge of functions entrusted to the judiciary alone. The statutory context in which many administrative tribunals function only serves to emphasise the need to constantly maintain that distinction. Caution has been expressed in respect to attempts to draw analogies between administrative decision-making and civil litigation: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 282. Brennan CJ, Toohey, McHugh and Gummow JJ there observed:

> *The nature of the decision-making process*
>
> We should mention one further matter. Submissions were made at the hearing of the appeal as to the correct decision-making process which it would have been permissible for the delegates to adopt. These submissions were misguided. They draw too closely upon analogies in the conduct and determination of civil litigation.
>
> Where facts are in dispute in civil litigation conducted under common law procedures, the court has to decide where, on the balance of probabilities, the truth lies as between the evidence the parties to the litigation have thought it in their respective interests to adduce at the trial. Administrative decision-making is of a different nature. A whole range of possible approaches to decision-making in the particular circumstances of the case may be correct in the sense that their adoption by a delegate would not be an error of law. The term "balance of probabilities" played a major part in those submissions, presumably as a result of the Full Court's decision. As with the term "evidence" as used to describe the material before the delegates, it seems to be borrowed from the universe of discourse which has civil litigation as its subject. The present context of administrative decision-making is very different and the use of such terms provides little assistance.

See also: *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93 at [117], (2014) 226 FCR 555 at 586 per Flick and Perry JJ; *Millar v Commissioner of Taxation* [2015] FCA 1104 at [139] per Griffiths J.

79 79 There remains, accordingly, neither a statutory source of any onus to be imposed upon the Tribunal in the present case; nor is there any sound reason of general principle to import into decision-making by the Tribunal the common law concept of onus.

80 80 None of these observations, however, should be construed as diminishing the appropriateness of an administrative decision-maker providing such assistance as may be appropriate to an unrepresented party: *Mladenov v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2014] FCA 12 at [48] per Mortimer J; *Wade v Comcare* [2002] FCA 289 at [25], (2002) 69 ALD 602 at 607 per Drummond and Dowsett JJ.

81 81 *Grounds 1* and *2* of the *Notice of Appeal* are rejected. Expressed in terms of a "*legal onus or burden of proof*", the proposition is an anathema to administrative decision-making.

THE FACTUAL FOUNDATION FOR REASONABLE SUSPICION

82 82 Presumably as a fall-back position to his principal submissions, Counsel for the Appellants sought to advance his *Ground* as formulated during the course of oral submissions that there was "*no evidence or no probative evidence upon which* [*the Tribunal*] *could reasonably suspect that the documents were 'bogus documents'*".

83 83 The fact that the power or function entrusted to the Tribunal (or the Minister) was initially to reach a state of "*satisfaction*" that *Public Interest Criterion 4020* was itself "*satisfied*" (s 65) and thereafter for the Tribunal (or the Minister) to have material upon which it could "*reasonably suspect*" that a document had a particular character (s 97), it was quite correctly submitted on behalf of the Appellants, did not preclude this Court examining the basis upon which the Tribunal reached its conclusion: *Avon Downs Pty Ltd v Commissioner of Taxation (Cth)* (1949) 78 CLR 353 at 360. And it was further quite properly submitted that the matters in respect to which the Tribunal (or the Minister) was required to form a "*reasonable suspicion*" (s 97) were matters more relevant to proof than matters of "*opinion or policy or taste*" where there will be "*a very wide discretion which cannot be effectively reviewed by the courts*": cf. *Buck v Bavone* (1976) 135 CLR at 119; *Rich v Attorney-General (NSW)* [2013] NSWCA 419 at [20]. If there was no lawful basis upon which the Tribunal

could "*reasonably suspect*" that the documents were "*bogus documents*", the Tribunal could not lawfully reach a state of "*satisfaction*" for the purposes of s 65 of the *Migration Act*. Without trespassing into the fact-finding responsibility entrusted by the Legislature to the Migration Review Tribunal alone, it remained open to the Court to examine the factual foundation upon which the Tribunal concluded that it "*reasonably suspected*" the documents were "*bogus documents*".

84 84 But this argument, as reformulated, faced either of two insurmountable hurdles, namely:

14 • the fact that the argument as reformulated was not an argument advanced for resolution before the Federal Circuit Court; and/or

15 • the fact that the Tribunal in its reasons for decision set forth an adequate factual basis for its conclusions that each of the eleven documents were "*bogus documents*".

The former hurdle may presently be left to one side; it was the latter hurdle at which Counsel for the Appellants stumbled and fell and from which he could not rise again: D Farnham, *Ghandi's Teachings for Troubled Times* (2014). Battered and bruised, it must nevertheless be said that he did "*not run away from the battle.*"

85 85 Paragraphs [111] to [116] include the relevant factual basis upon which the Tribunal proceeded to reach its state of satisfaction that the documents were "*bogus documents*", including factual conclusions in respect to one or other of the documents that:

16 • the documents did not appear to be facsimile copies, as claimed by the Appellants, by reason of the absence of facsimile transmission details;

17 • the absence of a person's signature on one of the documents;

18 • the presence of signatures on one version of documents provided but the absence of those signatures on another version of the same documents;

19 • no original copy of any of the eleven documents had been provided; and

20 • at the time one of the documents was signed, and in respect to which there was a question whether it had been altered by Mr Sun without authority, Mr Sun was not a director of the relevant company.

The Tribunal also noted in respect to a number of the documents that:

21 • there was an absence of corroborative evidence.

In respect to each of these factual matters, Mr Sun provided an explanation. But his explanations were rejected by the Tribunal. It may, perhaps, be appropriate to characterise at least one of the facts relied upon by the Tribunal as involving more a matter of personal judgement or opinion – and perhaps for that reason one more appropriately characterised as "*surmise or conjecture*" (*George v Rockett* (1990) 170 CLR at 115 to 116), namely:

22 • the assessment by the Tribunal that "*the writing on both documents is very clear*".

But the conclusion formed by the Tribunal as to the documents being "*bogus documents*" was an assessment founded upon the cumulative effect of a number of factors. It would be an impermissible intrusion into the fact-finding task entrusted to the Tribunal alone for a court conducting judicial review to impugn an assessment founded upon a number of factors merely because the court had reservations as to one of the facts relied upon.

86 86 Of present importance is that there remained "*objective circumstances*" upon which the "*reasonable suspicion*" of the Tribunal was founded. The "*objective circumstances*" could not properly be characterised as mere "*surmise or conjecture*": *George v Rockett* (1990) 170 CLR at 115 to 116. Admittedly the Tribunal's statement of its "*satisfaction*" that the documents were "*bogus documents*" carried with it a recognition that there was "*an element of fraud or deception*": *Trivedi* [2014] FCAFC 42 at [33], (2014) 220 FCR at 177 to 178 per Buchanan J. That was a finding not lightly to be made. Whether a different decision-maker would have formed the same state of suspicion was not to the point; what was relevant was that the state of "*reasonable suspicion*" reached by the Tribunal was a conclusion open to it on the facts.

87 87 Once there was an objective factual foundation for the Tribunal's conclusion, any further attempt to challenge those conclusions trespassed into the impermissible attempt to cavil with factual conclusions not disclosing any error of law.

THE APPLICATION FOR LEAVE TO AMEND

88 88 Leave to raise proposed *Ground 4* of the *Amended Notice of Appeal* is required because it was not an argument advanced before the Federal Circuit Court. Leave would also be required to advance the "*fall-back position*" of the Appellants, being the proposition

advanced orally during submissions. That, too, was an argument not advanced before the primary Judge.

89 89 In the absence of reason to do so, a court will not allow an appellant to depart from the basis upon which a case has been conducted at first instance: *Metwally v University of Wollongong* (1985) 59 ALJR 481 at 483; *Zheng v Cai* [2009] HCA 52 at [16], (2009) 239 CLR 446 at 453; *Vella v Minister for Immigration and Border Protection* [2015] HCA 42 at [18], (2015) 326 ALR 391 at 395 per Gageler J. As a "*general rule a party is bound by the conduct of his case*": *Park v Brothers* [2005] HCA 73 at [34], (2005) 222 ALR 421 at 430. Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ there went on to observe that there are nevertheless "*circumstances in which the interests of justice may lead an appellate court to permit a party to raise a point that was not taken at trial…*". There is, moreover, a legitimate interest in public law matters being resolved in a timely and efficient manner: *Iyer v Minister for Immigration and Multicultural Affairs* [2001] FCA 929 at [62], (2001) 64 ALD 9 at 24 per Gyles J; *SZKMS v Minister for Immigration and Citizenship* [2008] FCA 499 at [30] per Lander J.

90 90 But an appellate court retains a discretion to allow a new argument to be raised on appeal where it is expedient in the interests of the administration of justice to do so: *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158 at [48] per Kiefel, Weinberg and Stone JJ.

91 91 In the present proceeding, Counsel for the Respondent Minister opposed the grant of leave to amend – be it the amendment that was embraced within proposed *Ground 4* or that which was formulated during oral submissions. *Ground 4*, it will be noted, is expressed for some reason merely in terms of "*an onus of proof*"; the reference to "*burden of proof*" has disappeared.

92 92 Leave to amend to raise either new argument is opposed, but not by reason of any prejudice to the Minister if leave were to be granted, or because the new argument is susceptible of being met by evidence which potentially could have been led at first instance. Opposition to the amendment was founded upon one or other of three factors, namely:

23 • the constant necessity to bear in mind that the Court as presently constituted is exercising appellate jurisdiction and not original jurisdiction and too readily to permit the running of new arguments would undermine the appellate process by rendering

the hearing at first instance almost irrelevant (*WAJR v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 106 at [19], (2004) 204 ALR 624 at 629 per French J; *Prodduturi v Minister for Immigration and Border Protection* [2014] FCA 624 at [28], (2014) 142 ALD 550 at 555 per Perram J);

24 • the fact that the Appellants in the present proceeding, unlike many appellate cases arising on appeal from the Federal Circuit Court involving decisions made under the *Migration Act*, were represented by Counsel at first instance and no satisfactory explanation has been provided for why either of the two new arguments was not raised for resolution before that Court; and

25 • the lack of any self-evident merit in the proposed new argument – stripped of its gloss, the argument is an impermissible attempt to cavil with the findings of fact made by the Tribunal or the weight it gave to that evidence it relied upon to support its findings that each of the eleven documents were "*bogus documents*".

Each of these arguments is accepted. Notwithstanding the initial attraction of a submission that it was a question of general public importance to the administration of the *Migration Act* whether the Tribunal assumed any "*onus or burden of proof*", as the argument developed it quickly became a submission devoid of merit.

93 93 Although Counsel for the Respondent Minister accepted that the grant of leave may have repercussions for the manner in which the discretion as to costs should be exercised, the refusal of leave means that it is unnecessary to consider any separate costs orders that otherwise may have been made in the event that the new argument formed the basis of some success on appeal.

94 94 The dismissal of the appeal and the refusal of leave have the consequence that the Appellants should pay the costs of the Respondent Minister.

CONCLUSIONS

95 95 To the extent that *Grounds 1*, *2* and *4* sought to impose upon the Migration Review Tribunal "*a legal onus or burden of proof*", those *Grounds* are misconceived. The concept of an "*onus or burden of proof*" is one derived from the practice and procedure and rules of evidence applicable in superior courts of law entrusted with resolving a litigious dispute between parties. As a general proposition such a concept has no application to decision-making by administrators and administrative tribunals. As a general proposition, such a general analogy between administrative tribunals and courts has been consistently rejected.

The imposition of a burden of proof upon the Migration Review Tribunal, now the Administrative Appeals Tribunal, is neither expressly imposed by any legislative requirement; nor is such a burden to be implied by reference to the terms of the *Migration Act* or the *Migration Regulations*.

96 96 To the extent that the Appellants sought to impugn the findings of the Tribunal, that certain documents were "*bogus documents*", as findings based upon "*surmise or conjecture*" as opposed to facts having "*probative*" weight, the Appellants sought impermissibly to propel this Court into the exclusive role of the Tribunal in making findings of fact. Rather than there being "*no evidence*" upon which the Tribunal could "*reasonably suspect*" that the documents were "*bogus documents*", there was ample material upon which such a reasonable suspicion could be founded. And the Minister could be lawfully "*satisfied*" that *Public Interest Criterion 4020* was not "*satisfied*".

97 97 The appeal should be dismissed and the Appellants ordered to pay the costs of the Respondent Minister.

THE ORDERS OF THE COURT ARE:

(1) 1. The application for leave to amend the *Notice of Appeal* is refused.

(2) 2. The appeal is dismissed.

(3) 3. The Appellants are to pay the costs of the First Respondent.

I certify that the preceding seventy-six (76) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Flick and Rangiah.

Associate:

Dated: 5 April 2016